RECORD AND BRIEFS

No. 15-577

In The
Supreme Court of the United States

TRINITY LUTHERAN CHURCH OF COLUMBIA, INC.,
PETITIONER

v.

SARAH PARKER PAULEY, DIRECTOR,
MISSOURI DEPARTMENT OF NATURAL RESOURCES,
IN HER OFFICIAL CAPACITY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE GENERAL COUNCIL OF THE ASSEMBLIES OF GOD AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether Missouri's refusal to allow Trinity Lutheran to participate in a secular aid program intended to improve playground safety, solely because it is a religious organization, violated the Free Exercise Clause.

2. Whether this Court's decision in *Locke v. Davey*, 540 U.S. 712 (2004), permitted Missouri to exclude Trinity Lutheran from participation in a secular aid program solely because it is a religious organization.

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BRIEF FOR GENERAL COUNCIL OF THE ASSEMBLIES OF GOD (USA) AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

This brief is submitted on behalf of the General Council of the Assemblies of God (USA).[1]

INTEREST OF *AMICUS CURIAE*

The General Council of the Assemblies of God (USA), together with Assemblies of God congregations around the world, is the world's largest Pentecostal denomination. It has approximately 67 million members and adherents worldwide. Its national office is located in Springfield, Missouri.

The Assemblies of God operates seventeen colleges and universities in the United States. Local congregations also operate schools throughout the United States, and the Assemblies of God participates in the Association of Christian Teachers and Schools.

Because it is headquartered in Missouri, the Assemblies of God is concerned with the application to its operations, including to its schools, colleges, and universities, of Article I, § 7, of the Missouri Constitution.

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[1] All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of the brief. No person other than *amicus curiae* or its counsel made a monetary contribution to the preparation or submission of this brief.

Religious freedom is critically important to the Assemblies of God. As part of its religious mission, the Assemblies of God actively shares the gospel of Jesus Christ in this country and around the world. It cherishes the constitutionally-guaranteed freedom of religion, and it seeks to foster a society in which religious adherents of all faiths may follow the dictates of their conscience.

The Assemblies of God also has a keen interest in not being discriminated against because of its religious mission. The Eighth Circuit's decision, if allowed to stand, would impede the Assemblies of God's educational efforts and deprive its congregations of the benefits afforded to all of the other citizens of Missouri.

INTRODUCTION AND SUMMARY OF ARGUMENT

No state may, without violating the Free Exercise Clause, single out religious organizations for discriminatory treatment. *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 538 (1993). A state violates the Free Exercise Clause if it "discriminates against some or all religious beliefs." *Id.* at 532.

Missouri created a program to assist non-profit organizations in purchasing recycled tires for use in improving the safety of school playgrounds. Trinity Lutheran applied for assistance and, without any dispute, qualified to participate in the program. But Missouri refused Trinity Lutheran's application solely because it is a religious organization. Missouri based its decision on Article I, § 7 of its Constitution, which prohibits using state funds to aid churches.

This application of Article I, § 7, violated the Free Exercise Clause. Missouri's decision was neither neutral as to religion nor based on any generally applicable principle. It was, by Missouri's own admission, discrimination against a religious organization.[2] As a result, Missouri's decision may stand only

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[2] In its opposition to Trinity Lutheran's Petition for a Writ of Certiorari, Missouri admitted it denied the church's grant application because awarding the grant to a religious organization would mean "turning down non-church applicants." Br. in Opp. 3. This assertion is plainly false, as Trinity Lutheran's application undisputedly was superior to all but four of the grant applications. If Missouri had rejected the application of

(Continued on following page)

if it survives strict scrutiny. *Lukumi*, 508 U.S. at 546 ("A law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny.").

Strict scrutiny means that Missouri's actions violated the Free Exercise Clause unless they furthered a compelling state interest. *Id.* at 532-33. But Missouri had no legitimate interest in preventing a religiously-affiliated school from improving the safety of its playground. And Missouri's claimed overarching interest—maintaining a separation between church and state that is more stringent than that required by the United States Constitution—is not advanced by denying funds to a religious organization when those funds would have been used for an entirely secular purpose.

Missouri defends its behavior by citing this Court's decision in *Locke v. Davey*, 540 U.S. 712 (2004). But *Locke* involved scholarships to train future ministers in "devotional theology," and this Court concluded that the Free Exercise Clause does

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some non-church applicant, it would not have done so because of the applicant's non-religious status, but because its application was ranked lower based on other objective criteria.

In any event, Missouri admits it favored non-church applicants at the expense of religious organizations. It admitted it wants no limits on "the government's ability to decide what message of endorsement it wants to send." *Id.* at 4. Apparently, Missouri's message to its citizens is that it endorses playground safety for non-religious children but not for religious children.

not compel a state to fund religious vocational training. *Locke* does not sanction, and should not be extended to allow, the discriminatory denial of generally available secular public benefits to religious organizations.

ARGUMENT

I. MISSOURI'S REFUSAL TO ALLOW TRINITY LUTHERAN TO PARTICIPATE IN A PLAYGROUND SAFETY PROGRAM DISCRIMINATED AGAINST RELIGION

The Free Exercise Clause of the First Amendment, which is applicable to the states through the Fourteenth Amendment, provides that neither Congress, nor any state, may make any law "prohibiting the free exercise" of religion. U.S. Const. amend. I.

The Free Exercise Clause does not just bar laws that prohibit religion. It also bars laws that discriminate on the basis of religion. As this Court has said, no state may, without violating the Free Exercise Clause, "target[] religious conduct for distinctive treatment" or single out "religious practice" for "discriminatory treatment." *Lukumi*, 508 U.S. at 534, 538.

> At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons.

Id. at 532; *see also id.* at 560 (Souter, J., concurring) ("That the Free Exercise Clause contains a 'requirement for governmental neutrality' is hardly a novel proposition." (internal citation omitted)).

One way in which a state impermissibly discriminates against religion is by denying religious organizations the opportunity to participate in state-run programs. No state may discriminate "in the distribution of public benefits based upon religious status or sincerity." *Mitchell v. Helms*, 530 U.S. 793, 828 (2000).

Discrimination in the provision of government benefits impedes the free exercise of religion because it tends to pressure religious adherents to abandon their convictions. As this Court explained in *Sherbert v. Verner*, 374 U.S. 398 (1963), withholding government benefits based on religious beliefs or conduct inevitably imposes undue burdens on religious observance. Denying government benefits based on religion "forces [an individual] to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand." *Id.* at 404. Thus, the "imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her * * * worship." *Ibid.* *See also ibid.* ("It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege.").

This Court has repeatedly emphasized that, once a state decides to fund a benefits program, it may not dole out those benefits in a way that discriminates against religious organizations or religious adherents.

For example, in *Zobrest v. Catalina Foothills School District*, 509 U.S. 1 (1993), this Court held that a school district could not decline to provide a sign-language interpreter to a deaf student simply because he attended a Roman Catholic parochial school. In reversing the lower court, this Court explained that the First Amendment does not disable religious institutions "from participating in publicly sponsored social welfare programs." *Id.* at 8 (citing *Bowen v. Kendrick*, 487 U.S. 589, 609 (1988)). "For if the Establishment Clause did bar religious groups from receiving general government benefits, then 'a church could not be protected by the police and fire departments, or have its public sidewalk kept in repair.'" *Ibid.* (quoting *Widmar v. Vincent*, 454 U.S. 263, 274-75 (1981)).

Similarly, in *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986), this Court ruled that a state erred in denying vocational assistance to a blind student at a Christian college. The state had declined to provide the assistance because of a state constitutional provision forbidding "the use of public funds to assist an individual in the pursuit of a career or degree in theology." *Id.* at 483. But this Court concluded the denial was improper, because the state's assistance program "works no state support of religion prohibited by the Establishment Clause." *Id.*

at 489. *See also Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 835 (1995) (state-run university must "ration or allocate" activity funds to student groups based "on some acceptable neutral principle" without discriminating against religious viewpoints).

This Court has also concluded, in three separate unemployment cases, that a state may not condition eligibility for unemployment benefits upon an individual's willingness to forego some aspect of his religious observance. *Sherbert*, 374 U.S. 398; *Thomas v. Review Bd., Ind. Emp't Sec. Div.*, 450 U.S. 707 (1981); *Hobbie v. Unemp't Appeals Comm'n of Fla.*, 480 U.S. 136 (1987).

Moreover, this Court has repeatedly approved state programs that provide equal benefits to religious and non-religious organizations. Thus, in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), this Court upheld a state-funded scholarship program that provided tuition aid and tutorial assistance to students attending public schools, secular private schools, and religious private schools. The Court observed:

> [The] program is entirely neutral with respect to religion. It provides benefits directly to a wide spectrum of individuals, defined only by financial need and residence in a particular school district.

Id. at 662.

Similarly, in *Mitchell*, this Court upheld a program providing educational supplies and equipment to secondary schools, including sectarian and parochial schools. In so doing, the Court said it has "consistently turned to the neutrality principle, upholding aid that is offered to a broad range of groups or persons without regard to their religion." 530 U.S. at 794. The Court concluded: "the religious nature of a recipient *should not matter* to the constitutional analysis, so long as the recipient adequately furthers the government's secular purpose." *Id.* at 827 (emphasis added). *See also Mueller v. Allen*, 463 U.S. 388, 395 (1983) (upholding tax deduction for tuition payments made to private religious schools because "assist[ing] parents in meeting the rising cost of educational expenses plainly serves" a "secular purpose").

Missouri's application of Article I, § 7, here runs afoul of the neutrality principle set out in these cases. Neutrality is the rule, and state-provided benefits must be distributed based on neutral principles and not offered—*or withheld*—because of religion.

Missouri rejected Trinity Lutheran's application to participate in the playground improvement program simply because it is a religious organization. In so doing, the state put to Trinity Lutheran a stark choice—abandon its religious affiliation in order to qualify for the state's grant program, or adhere to its religious convictions but forego improving the safety of its playground. That violated the Free Exercise Clause.

II. MISSOURI DID NOT APPLY ARTICLE I, § 7, IN A NEUTRAL OR GENERALLY APPLICABLE MANNER

If Missouri had implemented its playground safety grant program in a neutral way, and allocated safety grants using rules that were generally applicable to all applicants, then it would have had substantial leeway to act without offending the Free Exercise Clause. The Free Exercise Clause does not prevent a state from enacting a "neutral law of general applicability" even if that law has a disparate impact on religious organizations. *Emp't Div. v. Smith*, 494 U.S. 872, 879 (1990).

Missouri did not apply Article I, § 7, in a neutral or generally applicable manner, however. Missouri used Article I, § 7, to single out a school for disfavor *simply because it is a religious organization*.

This application of Article I, § 7, fails the *Smith* test. A law is not "neutral" if it targets "a religious practice without a secular meaning discernible from the language or context." *Lukumi*, 508 U.S. at 533. And a law is not "generally applicable" if "the governmental interests it seeks to advance are worthy of being pursued only against conduct with a religious motivation." *Id.* at 543. *See Cent. Rabbinical Congress of the U.S. & Can. v. N.Y.C. Dep't of Health & Mental Hygiene*, 763 F.3d 183, 186 (2d Cir. 2014) (health regulation requires strict scrutiny because, although facially neutral, it "purposefully and exclusively targets a religious practice for special burdens").

Missouri argues that state funding falls outside *Smith*'s "neutrality" principle. Br. in Opp. 7-8. Missouri claims that "neutral funding [has] not carried the day at the Supreme Court." *Ibid.* (citing *Badger Catholic, Inc. v. Walsh*, 620 F.3d 775, 779 (7th Cir. 2010)). Thus, according to Missouri, "the State [may] choos[e] where to spend limited funds over which it 'retains plenary control.'" *Id.* at 8 (citing *Badger Catholic*, 620 F.3d at 780).

Missouri's argument misunderstands the breadth and scope of this Court's neutrality principle. *Lukumi*, for example, expressly forbids discrimination against religion, and nothing in that decision carves out an exception for state funding of secular benefits. Quite the contrary: *Lukumi* says that "a law targeting religious beliefs as such is *never* permissible," and it forbids "even subtle departures from neutrality." 508 U.S. at 533-34 (emphasis added).

Sherbert v. Verner, *Zobrest v. Catalina*, and many other cases involving state funding similarly forbid the withholding of generally available secular benefits on the basis of religion. *Sherbert*, 374 U.S. 398; *Zobrest*, 509 U.S. 1; *see also Thomas*, 450 U.S. 707; *Hobbie*, 480 U.S. 136 (1987). As this Court concluded in *Mitchell*, no state may discriminate "in the distribution of public benefits based upon religious status or sincerity." 530 U.S. at 828.

Certainly a state has control over its budget, and may make many permissible choices among its funding priorities. But that does not mean a state can

make *any* choice. Its funding decisions must still comply with the Free Exercise Clause. This Court's decisions do not admit any "state funding" exception to the neutrality rule. Laws which are not applied in a neutral and generally applicable manner must survive strict scrutiny under the Free Exercise Clause. Article I, § 7, was not applied in a neutral and generally applicable manner in this case. If it is to survive, therefore, it must overcome strict scrutiny's high hurdle.

III. MISSOURI'S APPLICATION OF ARTICLE I, § 7, CANNOT SURVIVE STRICT SCRUTINY

"A law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny." *Lukumi*, 508 U.S. at 546. It must, among other things, "advance 'interests of the highest order'" and "will survive strict scrutiny only in rare cases." *Ibid.*

Strict scrutiny requires Missouri to articulate a compelling state interest and implement that interest using the least restrictive means. *Id.* at 532-33. Missouri's application of Article I, § 7, in this instance did not further any compelling state interest.

The Eighth Circuit described Missouri's government interest as a desire to maintain a "high wall of separation between church and state." Pet. App. 12a.

But this Court has already identified the constitutional limitations on Missouri's interest in maintaining a separation between church and state that is more severe and restrictive than that required by the First Amendment. In *Widmar v. Vincent*, this Court held that Missouri's claimed interest in "achieving greater separation of church and State than is already ensured under the Establishment Clause" was "limited by the Free Exercise Clause." 454 U.S. at 276.

For that reason, this Court struck down a University of Missouri policy that denied religious student groups the same access to university facilities as was provided to other student groups. The Court reasoned that, having decided to open school facilities to student groups generally, "the University has assumed an obligation to justify its discriminations and exclusions under applicable constitutional norms." *Id.* at 267. Missouri's interest in maintaining a high degree of separation between church and state was not enough to justify excluding religiously oriented student groups from campus facilities when other student groups were allowed to use those facilities. *Ibid. See also Lamb's Chapel v. Ctr. Moriches Sch. Dist.*, 508 U.S. 384 (1993) (school district improperly discriminated against religious groups when it allowed the use of school property for specified public purposes but denied access to religious groups); *Rosenberger*, 515 U.S. at 834 (university improperly discriminated against student-run religious publication by withholding funding; a university "may not

discriminate based on the viewpoint of private persons whose speech it facilitates"); *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106 (2001) (school improperly discriminated against religious organization by denying after-school access; state "must not discriminate against speech on the basis of viewpoint").

Widmar v. Vincent teaches that Missouri's interest in erecting a higher wall between church and state has a limit. That limit is the Free Exercise Clause. Missouri may not allocate government resources to some groups but deny others on the basis of religion without violating the Free Exercise Clause.

If that is true for religious student groups and activities, it must be even more true for school playgrounds. After all, in *Widmar*, this Court assumed that the university's facilities would be used "to engage in religious worship and discussion." 454 U.S. at 269. Here, by contrast, Trinity Lutheran's playground will not advance religion, or promote religious speech, worship, or discussion, in any conceivable sense. No wall between church and state, no matter how high, will be breached by enhancing the safety of Trinity Lutheran's playground. And Missouri has not offered any reason why its interest in maintaining an extra-high wall between church and state would be disserved if children playing at a church playground were as safe as children playing elsewhere.

It is not enough for Missouri to say it has a "compelling interest" in maintaining a separation

between church and state. It is not even enough for Missouri to say it wishes to maintain a separation that is greater than that required by the First Amendment. To survive scrutiny under the Free Exercise Clause, Missouri's application of Article I, § 7, must not unfairly discriminate against religious organizations. It must maintain a policy of equal access and implement that policy with strict neutrality. *Id.* at 267.[3]

Because Missouri did not offer its playground safety grants in a neutral and generally applicable

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[3] Missouri incorrectly argues that its discriminatory treatment of religious organizations does not violate the First Amendment because it is not motivated by anti-religion animus. But this Court has never held that animus is an essential prerequisite to a Free Exercise Clause violation. "The First Amendment does not refer to the purposes for which legislators enact laws, but to the effects of the laws enacted." *Lukumi*, 508 U.S. at 558 (Scalia, J., concurring); *see also id.* at 569-70 (Souter, J., concurring) ("[T]he Court repeatedly has stated that the [Free Exercise] Clause sets strict limits on the government's power to burden religious exercise, whether it is a law's object to do so or its unanticipated effect."); *id.* at 577 (Blackmun, J., concurring) ("[T]he First Amendment's protection of religion extends beyond those rare occasions on which the government explicitly targets religion (or a particular religion) for disfavored treatment."). *See also Cent. Rabbinical Congress*, 763 F.3d at 197-98 ("[C]lose scrutiny of laws singling out a religious practice for special burdens is not limited to the context where such laws stem from animus."); *Shrum v. City of Coweta*, 449 F.3d 1132, 1144 (10th Cir. 2006) (the "Free Exercise Clause is not limited to acts motivated by overt religious hostility" but also protects "the free exercise of religion from unwarranted governmental inhibition whatever its source").

way, and because its discrimination against a religious organization did not further any compelling state interest, its application of Article I, § 7, in this instance violated the Free Exercise Clause.

IV. *LOCKE V. DAVEY* DOES NOT EXCUSE MISSOURI'S DISCRIMINATION AGAINST TRINITY LUTHERAN'S SECULAR ACTIVITIES

Missouri defends its decision by citing this Court's decision in *Locke v. Davey*, 540 U.S. 712 (2004). The Eighth Circuit sided with Missouri on the same grounds. Pet. App. 10a.

The Eighth Circuit erred in thinking that Trinity Lutheran asserted a facial challenge to Article I, § 7.[4] It compounded that error by misreading *Locke*'s scope and logic.

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[4] The Eighth Circuit held that Trinity Lutheran's complaint was a "plainly facial attack" on Article I, § 7. Pet. App. 6a-7a. That was error. Trinity Lutheran never challenged Missouri's right to refuse to make an appropriation to a church, denomination, priest, or minister. Trinity Lutheran instead challenges the way Missouri applied Article I, § 7 *in this case*—which involves a public grant program created for the entirely secular purpose of improving playground safety.

Judge Gruender, writing in dissent, correctly concluded that Trinity Lutheran "does not mount the expansive facial challenge that the court attributes to it. Trinity Lutheran tries to bring an as-applied challenge; the complaint says so numerous times." Pet. App. 24a. "Trinity Lutheran does not contend that Article I, § 7 of the Missouri Constitution is unconstitutional in all of its applications." Pet. App. 24a-25a.

In *Locke*, this Court held that Washington State could properly decline to offer taxpayer-funded scholarships to students training full-time for the ministry while offering scholarships to students pursuing other majors. *Locke*, 540 U.S. at 722 n.5. The Court held that this did not offend the Free Exercise Clause's non-discrimination principle because the state had "merely chosen not to fund a distinct category of instruction" intended to "prepare students for the ministry." *Id.* at 719, 721. The Court also acknowledged the State's long-standing interest in not providing public funding to the clergy. *Id.* at 722-23.

Locke's facts are completely different from the facts here. It is one thing for a state to decline to fund vocational religious training; it is quite another for the state to exclude churches from participating in a public safety program offered to every other qualifying organization in the state.

Two features of the *Locke* decision plainly show why it does not supply the rule of decision in this case.

A. *Locke* Distinguished Between Educating Clergy And Funding Secular Education; No Distinction Can Be Made Between Sectarian And Secular Playground Safety

Locke turned on the distinction between secular education and religious training for the ministry. The *Locke* Court drew a bright line between "training for

secular professions" and "training for religious professions." *Id.* at 721. The Court found that "devotional theology" is "a distinct category of instruction." *Ibid.* Training for the ministry, it concluded, is "an essentially religious endeavor" "akin to a religious calling," and is qualitatively different than "an academic pursuit." *Ibid.* Funding religious vocational training would be the equivalent of using "taxpayer funds to support church leaders." *Id.* at 722.

The Court took great pains to emphasize that Washington State's scholarship program did *not* discriminate against religious instruction or against religious institutions generally. The Court noted approvingly that the program "permits students to attend pervasively religious schools, so long as they are accredited," and also allows students to take courses in religion. *Id.* at 724. The only exclusion was for "vocational religious instruction." *Id.* at 725.[5]

Locke thus stands for the limited proposition that a state may distinguish between secular education and vocational training for the clergy.

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[5] For this reason, the majority rejected a criticism leveled by Justice Scalia. Justice Scalia argued, in dissent, that the state discriminated against religion when it denied a "generally available" public benefit "solely on the basis of religion." *Id.* at 726-27 (Scalia, J., dissenting). The Court replied, not by rejecting the neutrality principle, but by holding it did not apply because the "generally available" scholarship was to train students for secular professions, and "training for religious professions and training for secular professions are not fungible." *Id.* at 721.

The Eighth Circuit ignored this clear focus on training for the ministry. It read *Locke* as broadly permitting a state to discriminate against religious organizations in the provision of secular public benefits. *Ibid.* *Locke* did nothing of the sort. The *Locke* Court expressly emphasized the limits of its ruling when it cautioned that "the only interest at issue here is the State's interest in not funding the religious training of clergy." *Id.* at 722 n.5.[6]

Missouri has no comparable interest in not funding playground safety improvements for church-sponsored schools. There is no perceptible difference between the playgrounds of secular and sectarian schools. There is no difference in the need for improved playground safety between religious and non-religious organizations. And there is no neutral basis upon which Missouri might draw a line between religious and non-religious school grant recipients.

Missouri created a public program for the secular purpose of improving playground safety. Missouri denied Trinity Lutheran's application to participate in the program solely because it is a religious organization. Religion was the basis—the only basis—for denying Trinity Lutheran's application. That violated the Free Exercise Clause.

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[6] *See* Douglas Laycock, *Theology Scholarships, The Pledge of Allegiance, and Religious Liberty*, 118 Harv. L. Rev. 155, 184 (2004) ("There is much to suggest, beginning with the Court's discussion of tradition and its collection of early state constitutions, that the opinion is confined to the training of clergy.").

B. *Locke* Relied On A Substantial "Antiestablishment" State Interest In Not Supporting "Church Leaders"

The other important basis for this Court's decision in *Locke* was the state's "historic and substantial" "interest in not funding the religious training of clergy." 540 U.S. at 722 n.5, 725. The Court observed that, "[s]ince the founding of our country, there have been popular uprisings against procuring taxpayer funds to support church leaders." *Id.* at 722. For this reason, many states "placed in their constitutions formal prohibitions against using tax funds to support the ministry." *Id.* at 723. Focusing on this historic interest, the Court concluded that "the denial of funding for vocational religious instruction alone is [not] inherently constitutionally suspect." *Id.* at 725.

There is no corresponding historic or substantial state interest in preventing church-sponsored schools from making their playgrounds safer. The concerns cited in *Locke* focused precisely, and specifically, on the support of church leaders. *E.g.*, *id.* at 715 ("pursuing a degree in devotional theology"); *id.* at 716 ("pursuing a degree in theology"); *ibid.* ("devotional in nature or designed to induce religious faith"); *id.* at 721 ("akin to a religious calling"); *id.* at 722 n.5 ("State's interest in not funding the religious training of clergy"); *id.* at 725 ("denial of funding for vocational religious instruction").

There is no basis for extending *Locke*, from its origins as a rule against state funding for church

leaders, to permit the denial of public funding for a secular safety program benefiting school playgrounds. Indeed, this Court has held that "the Establishment Clause does not prevent a State from extending the benefits of state laws to all citizens without regard for their religious affiliation." *Bd. of Educ. of Cent. Sch. Dist. No. 1 v. Allen*, 392 U.S. 236, 242 (1968). The First Amendment permits a state to use taxpayer funds to provide bus fares for religious students, *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1 (1947), and to loan non-religious textbooks to religious schools, *Allen*, 392 U.S. at 242.

Whatever Establishment Clause concerns may have motivated Missouri's adoption of Article I, § 7, they could not have been the motivation for Missouri's decision, in this case, to deny a playground safety grant to a religious organization.

CONCLUSION

"The Free Exercise Clause commits government itself to religious tolerance." *Lukumi*, 508 U.S. at 547. Missouri fell short of that constitutional obligation in this instance.

Missouri created a public benefit program for a secular purpose—improving playground safety. Having created the program, it could not then limit participation in the program based on religion. Missouri denied Trinity Lutheran's application solely because it is a religious organization. By singling out

Trinity Lutheran for disfavored treatment, Missouri violated the Free Exercise Clause.

Respectfully submitted,

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